IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners
v.
WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

ANSWER OF RESPONDENT WILL BRYANT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ARTHUR L. SCHECHTER
2080 Two Shell Plaza
Houston, Texas 77002
(713) 223-1314
Attorney for Petitioner

Of Counsel:
SCHECHTER & SHELTON, INC.

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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LIST OF AUTHORITIES

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Respondent, WILL BRYANT, prays that Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be in all things denied, showing as follows:

OPINIONS BELOW

This case arises under the 1972 Amendments to the Longshoremen's and Harbor Workers' Act.

It had originated in the administrative tribunals established by that Act within the Department of Labor. The administrative law judge found no federal jurisdiction, but was reversed by the Benefits Review Board, 2 BRBS 408, reprinted as Appendix E to the original Petition for Certiorari in Number 76-641, pages 88 to 95.

This decision was affirmed in a single opinion by the Court of Appeals for the Fifth Circuit, reported *sub nom Perdue v. Jacksonville Shipyards, Inc.,* 539 F.2d 533 (1976). This Court vacated the judgments based on that 1976 opinion and remanded these cases to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977).

After remand to the Court of Appeals for the Fifth Circuit from the Court, the Court of Appeals reaffirmed its earlier decision based on its prior opinion cited above. The Court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978).

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903(a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.)

REVIEW OF THE FACTS OF THIS CASE

It has been heretofore stipulated in the record that the following facts were true:

Respondent, WILL BRYANT, sustained a fracture to his hand in the fifth metacarpal bone while working in a warehouse immediately adjacent to Pier 23 in the Port of Galveston, Texas. This pier adjoined the navigable waters of the United States.

In the Port of Galveston, cotton is received by various shoreside compress warehouses from inland shippers of cotton. The cotton is then drayed by trailers to the pier warehouses where it is removed and eventually shipped out on navigable waters.

At the time of this accident, Mr. Bryant, who was working out of International Longshoremen's Association Local 1308, was rolling a bale along a special purpose cotton dray wagon to the edge of the wagon to tip it over and head it off of the wagon in the pierside warehouse.

Though cotton is often taken for loading aboard vessels from the pierside warehouses, as it was on this occasion, it is sometimes directly taken from the shoreside transportation by longshoremen if the vessel on which it is to be shipped is waiting to be loaded. The pier facilities are thus constructed to allow direct transfer from a dray wagon such as that involved in the occurrence in question to shipboard.

At the time and on the occasion in question, WILL BRYANT's employer, AYERS STEAMSHIP CO., INC., operated a steamship agency and a terminal operation. It had employees who necessarily boarded ocean-going vessels and performed portions of their duties on the navigable waters of the United States. In its capacity as a terminal operator, additionally it received cargo for eventual loading aboard vessels and stored it in its pier-

side warehouses until space aboard vessels was ready to receive it or until longshore labor was available to load the cargo. The cotton on which Bryant was working at the time of his accident was loaded on May 7, 1973, onboard the vessel "KOREAN EXPORTER."

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THERE IS NO CONFICT BETWEEN THE OPINION BELOW AND DECISIONS OF THIS COURT

The holding of the Court below that the injured employee, WILL BRYANT, was engaged in "maritime employment" at the time of his injury is not in conflict with the decision of this Court in either *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977); with the Court's earlier decision in *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (1953); or *Noguiera v. N.Y., N.H. & N.R. Co.,* 281 U.S. 128 (1930).

This Court in *Caputo, supra,* adopts two tests for determination as to coverage under Section 2(3) of the Longshoremen's Act as amended in 1972. The first of these concerns the situs of the injury; the second, the status of the employee involved, as to whether or not he was performing work in maritime employment.

A.

The "Situs Test" of Caputo is Overwhelmingly Met

There can be no question that in 1972 Congress amended the Longshoremen's and Harbor Workers' Com-

pensation Act, 33 U.S.C. § 901, *et seq.*, extending the Act's coverage to protect additional workers in waterfront areas. The issue in this case is whether or not this extension embraces employees such as Mr. Bryant, who were engaged in maritime employment though not directly participating in work aboard any vessel.

At the time, Mr. Bryant was working at a site undoubtedly covered.

Section 33, U.S.C. § 903(a) states as follows:

> Compensation shall be payable in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

The language of this Section was changed in 1972 to cover workers such as Mr. Bryant, who were injured on adjoining piers, etc., and Congress extended the coverage of the Act shoreward.

Accordingly, there can be no question that Congress fully intended to cover areas such as the pierside warehouse in which WILL BRYANT was working at the time he sustained the injury made the basis of his claim. This pierside warehouse was only a few feet from water's edge. Although the cotton in question may have remained in the warehouse several days, as it did on this occasion, the warehouse and pier were set up in such a way that the cotton could be drayed directly onto the pier for immediate loading by a deepwater

longshoreman onto the vessel. Therefore, it seems that there should be little question that Mr. Bryant was working at a covered situs.

B.

The "Status Test" of Caputo is Met

The other test of *Caputo* is that of status. Sections 902(3) and 902(4) of the Act make it quite clear that Congress intended to establish coverage for any employee working in "maritime employment" in one of the areas designated. There is no conflict between the opinion of the Court below in the instant case and the opinion of this Court in *Caputo, supra,* with respect to this issue. In *Caputo* the Court recognizes the clear intent of Congress that there be no bifurcation of benefits between workers participating in maritime employment at a covered situs.

Bryant, working out of an International Longshoremen's Association local, performed most of his work in a covered area. On the occasion in question, he was working at a situs covered by the Act. His work was part of the overall loading procedure of vessels either then in port or soon to come into port. Under custom in Galveston, he could have just as easily been instructed to take these bales of cotton directly onto the pier and hand them over to a deepwater longshore loading gang for immediate loading into a ship. His work facilitated the movement of cargo from shore-based compressing companies and storage units to the pierside warehouse. Once he started to achieve his work at a covered situs, work which facilitated maritime movement of cargo, it is urged that he entered a maritime employment covered by the Act.

Bryant's work within the confines of the water's-edge warehouse was just as essential to the seaward movement of the cargo into the holds of oceangoing vessels as was the work of deepwater longshoremen who transported it from the water's edge into the hold of the vessel. The cargo moved into the storage area was undoubtedly destined for shipment aboard oceangoing vessels. The cotton involved herein was, in fact, shipped a few days after the occurrence. The functional relationship of the employee's activity to maritime commerce is the key under *Caputo, supra.* The line Congress intended to draw is not an arbitrary one, but distinguishes between maritime commerce and shore-based commerce. *Sea-Land Services, Inc. v. Johns,* 540 F.2d 629 (3d Cir. 1976).

The Fifth Circuit has similarly espoused this Congressionally intended broad view of coverage. *Alabama Dry Dock & Shipbuilding Co. v. Kininess and the Director, Office of Workmen's Compensation Programs, United States Department of Labor,* 554 F.2d 176; *Texport Stevedore Co. v. Winchester,* 554 F.2d 245 (1977).

Mr. Bryant's connection to the working of cargo was every bit as connected to maritime commerce as Mr. Caputo's. Mr. Bryant was working in an area covered by the Statute, performing labor which resulted ultimately in the more convenient handling of cargo loaded aboard seagoing vessels and, therefore, he was directly involved in the movement of maritime commerce. His work, as strongly as Mr. Caputo's, was performed in the cargo handling operation between the cargo's land transportation and sea transportation. Entry into the cov-

ered area with the cargo by Mr. Bryant was the first part of a two-part loading process of the cargo aboard the vessel. To bifurcate this two-part movement and to allow one laborer to be covered and another, whose work is equally important to the movement of maritime commerce in a covered pierside area, to be left uncovered would result in the sort of bifurcation that both Congress and this Court in *Caputo* found so distasteful in the interpretation of the intent of the Act.

II.

THERE IS NO CONFLICT WITH OTHER OPINIONS OF THIS COURT

A.

Nor is there any conflict between the Court's opinions in *Pennsylvania Railroad Co. v. O'Rourke, supra,* or *Noguiera v. N.Y., N.H. & H.R. Co., supra.* Both cases deal with pre-Amendment definitions of maritime employment and covered situs. In fact, *Noguiera,* in which the Court held that a railroad employee loading freight onto railroad cars on a car float in navigable waters was in maritime employment, it seems to Respondent, is authority that WILL BRYANT's work at the time and on the occasion in question should equally be held to be maritime employment.

In *Noguiera,* the turning point was the situs of the occurrence. Pre-Amendment, if Noguiera had been performing this work beyond the water's edge, undoubtedly he would not have been held to be covered. However, the Court at that time found him so covered because the situs was covered. Therefore, there is no conflict regarding the Court's finding in *Noguiera.*

Neither is *O'Rourke, supra,* in any way inconsistent with either the Court's decision in *Caputo* or the decision of the Court below in *Bryant.*

Therefore, for this reason, there is no conflict between *Bryant* and this Court which needs resolution by a Writ of Certiorari.

III.

THERE ARE NO CONFLICTS BETWEEN THE OPINION OF THE FIFTH CIRCUIT AND OTHER COURTS OF APPEAL, AND, IF SO, THE LAW OF THE FIFTH CIRCUIT SHOULD BE ALLOWED TO STAND

A.

The Petitioner seems to place much stock in conflicts between the Fifth Circuit's holding in the instant case and the case of *Conti v. Norfolk & Western Railway Co.,* 566 F.2d 890 (4th Cir. 1977). The facts seem so readily distinguishable as to render *Conti* worthless as far as any relevance to this case. *Conti* is a case that was brought under the Federal Employers' Liability Act in which the Longshoremen's and Harbor Workers' Compensation Act was enlisted as a defense. In *Conti* the laborers involved were so clearly involved with working in railroad employment that the Court held that the Federal Employers' Liability Act was their proper remedy. It is perhaps worthy to note that in that case the employees whose status was questioned were involved in the uncoupling of cars, the releasing of brakes, the rolling of cars, and not with the movement by hand of cargo on a dockside pier or in a warehouse immediately adjacent thereto. In fact, as the Court observes, none of the brakemen ever had occasion to go to Pier 6.

Therefore, in upholding the liberal interpretation to be given to the Federal Employers' Liability Act in its coverage, the Fourth Circuit did nothing in conflict with the Fifth Circuit.

Cargill, Inc. v. Powell, 573 F.2d 561 (9th Cir. 1977), is certainly more difficult to distinguish. However, *Powell* stands in conflict to the opinion of this Court in *Caputo.* It is urged, therefore, that if *certiorari* be granted in either, the issue can be resolved by the Court's handling of *Powell,* in which a Petition for Writ of Certiorari is pending.

It seems to Respondent that *Powell* should also come within the warm embrace of the Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

IV.

A LIBERAL AND BROAD INTERPRETATION SHOULD BE GIVEN TO THE ACT AS IT IS REMEDIAL IN NATURE

A.

There is no question but that an expansive and liberal interpretation should be given in particular reference to the extension of coverage of the Act to additional workers.

This Court observed in Caputo that:

> The language of the Amendments is broad and suggests that we take an expansive view of the

> extended coverage. Indeed such a construction is appropriate for this remedial legislation. The Act 'must be liberally construed in conformance with its purpose and in a way which avoids harsh and incongruous results.' *Voris v. Eikel,* 336 U.S. 328, 333 (1953)

The Fifth Circuit has similarly noted that the Act should be so liberally construed in promotion of its compensatory purposes. *Alabama Dry Dock & Shipbuilding Co. v. Kininess and the Director, Office of Workers Compensation Programs, United States Department of Labor, supra.*

CONCLUSION

This Court has said previously in *Caputo* that a broad view should be taken. There is nothing in the *Bryant* case which is not within the parameters set out by this Court in *Caputo.* It is, therefore, urged that the Petition for Writ of Certiorari be in all things denied.

WHEREFORE, Respondent, WILL BRYANT, respectfully moves this Court to in all things deny the Petition for Writ of Certiorari.

Respectfully submitted,

ARTHUR L. SCHECHTER
2080 Two Shell Plaza
Houston, Texas 77002
(713) 223-1314
Attorney for Petitioner

Of Counsel:
SCHECHTER & SHELTON, INC.